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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

SEYMOUR LACOB,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

Your petitioner, Seymour Lacob, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the district court's judgment in summarily denying his motion under 28 U.S.C. section 2255.

OPINIONS BELOW.

The opinions sought to be reviewed are contained in the Appendix filed with this Petition. They are

1. Order by the Honorable William J. Campbell, District Judge, United States District Court for the Northern District of Illinois, Eastern Division, No. 71 C 924. (App. A).

2. The opinion of the United States Court of Appeals, For the Seventh Circuit, No. 71-1457. (App. B).

JURISDICTION.

The judgment of the Court of Appeals affirming the District Court's denial of the motion pursuant to 28 U.S.C. 2255 was entered on February 23, 1972. (App. B). A timely Petition for Rehearing was denied March 13, 1972. (App. C).

QUESTIONS PRESENTED FOR REVIEW.

1. In view of this Court's guidelines in determining waiver of assistance of effective counsel at trial and sentencing, was there indeed a knowing, understanding and intelligent waiver at trial or at sentencing based on the following:

A. Petitioner was denied effective assistance of counsel in violation of his Sixth Amendment rights under the United States Constitution;

B. The trial court failed to properly exercise its duty in failing to advise petitioner that the government would pay for appointed counsel;

C. The trial court failed to inquire as to the petitioner's financial ability to partially pay an appointed counsel;

D. The Court of Appeals is in error in holding that only paupers or indigents are entitled to appointed counsel;

E. The Court of Appeals was in error in holding that petitioner, an attorney, was experienced and therefore waived counsel;

F. The trial court failed to inquire if petitioner was aware of the charges against him;

G. The trial court failed to inform the petitioner of the defenses to the charges against him;

H. The trial court failed to inform the petitioner of his constitutional right to the assistance of an attorney at the sentencing.

2. Is not the Court of Appeals in error when it summarily found that the following infringement of constitutional rights errors were raised and specifically disposed of, or could have been raised on direct appeal o that they were deliberately bypassed:

A. the *in camera* offer by the trial court that he would accept a plea of nolo contendere and thereupon impose a 60 day sentence and if the judicial bargain was refused he would apply his "30 year 'standing policy' of imposing between 3 and 5 years in *every* income tax case that has gone to trial". (Emphasis added) (R. 4C);(*)

B. the *in camera* instruction to the petitioner's then trial attorney to have the petitioner stipulate to the government's exhibits and he would take that into consideration *at the time of sentencing.* (Emphasis added) (R. 8C);

C. allowed the government, over the objections of the petitioner to select their "best" year (1960) of the four indicted years to be tried first and depending on the result, to hold the other years or counts in abeyance. (R. 2-3A). Allowed the prosecution to utilize the so-called excluded petitioner's income tax returns for the years 1958, 1959 and 1961 for the express purpose of showing a pattern of wilful evasion both prior and subsequent to year on trial. Allowed the prosecutor to make comments during closing argument relating to the excluded years, (R. 33D) and further the trial court even instructed the jury as follows:

(*) (R. ....), refers to Common Law Record (attached to 2255 motion for reader's convenience); (App. ....) refers to Appendix attached hereto.

"Wilfulness may be inferred from all of the facts and circumstances in evidence, including the exhibits. In determining whether defendant acted wilfully the jury may consider, along with the other evidence in the case defendant's *prior and subsequent acts* relating to his income tax obligations. Such evidence may indicate whether he was acting in good faith or whether he intended to evade the law." (R. 649). (Emphasis added);

D. the total and complete disallowance of side bar conferences (all matters of law were argued in the presence of the jury) (R. 24);

E. the total and complete absence of reasons for trial judge's rulings;

F. restricting the character witness testimony as to reputation of the petitioner to the community where he lives and not to where he works (R. 377);

G. compelling the petitioner to testify in violation of his constitutional rights;

H. by forcing petitioner to immediate trial without the assistance of effective counsel.

3. Was the Circuit Court of Appeals correct in failing to rule if the District Court abused its discretion in imposing sentence?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED.

The constitutional provisions, statutes, rules upon which this petition is based are set forth herein as Appendix E.

STATEMENT OF THE CASE.

On January 8, 1968, the petitioner a lawyer with no prior federal criminal trial experience incapably and inadequately represented himself, after the trial court failed to advise him of his constitutional right to have assistance of effective counsel, at a complicated income tax evasion trial.

After a refusal to accept the trial judge's bargain of pleading *nolo contendere* and sixty days imprisonment, petitioner was sentenced to three years in prison pursuant to the trial judge's "thirty year standing policy to sentence all defendants to between three and five years on every income tax case that has gone to trial."

This case involves the denial of petitioner's motion under 28 U.S.C. section 2255 for vacation of conviction and sentence.

The District Court for the Northern District of Illinois, Eastern Division, denied the motion without an evidentiary hearing on April 25, 1971. On February 23, 1972, the Circuit Court of Appeals, For the Seventh Circuit affirmed and rehearing was denied on March 13, 1972.

REASONS FOR GRANTING THE WRIT.

I.

A.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment partially provides as follows:

> "* * * in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

While the word "effective" does not appear in the Constitution itself, it was held in *Powell* v. *Alabama*, 287 U.S. 45, 71, 53 S. Ct. 55 (1932) that the failure of the trial court to make an effective appointment was a denial of due process of law. Additionally, Rule 44 of the Federal Rules of Criminal Procedure states:

> "If the defendant appears in court without counsel the court shall *advise him of his right to counsel and assign counsel* to represent him at every stage of the proceedings, unless he elects to proceed without counsel or is able to obtain counsel." (My emphasis)

At no time before the trial commenced or during the trial or sentencing did the trial court advise this petitioner of his right to assistance of counsel nor did he assign counsel. He did offer to appoint Miss Anna R. Lavin, who was discharged by petitioner two weeks prior to the trial for financial reasons. The Court suggested that he would appoint Miss Lavin *if the petitioner liked*. At no time did he represent to the inexperienced, unknowing petitioner that he was entitled to have assistance

of counsel as a matter of *right*. The pertinent sections of the colloquy at the start of the trial are:

> The Court: Now, the only thing is this: I still recommend to you, did you discharge Miss Lavin because of financial reasons?
>
> Mr. Lacob: Yes, sir, and the possibilities of verdict going either way and further expenses.
>
> The Court: Now, then, that being so, *if you would like* the assistance of someone from the Federal Defenders Office to sit with you during the trial, I certainly have to accede to your wish to try your own case. * * * and if your reasons for discharging Miss Lavin and going ahead yourself are in any way financial and *you would like* the assistance of someone sitting with you at the trial, I will appoint someone from our Federal Defender roll, *if you would like* me to do so.
>
> Mr. Lacob: I wouldn't want to do that to Miss Lavin. She is a very busy lawyer.
>
> The Court: She is also an Officer of this Court and she will accept the appointment if I give it to her. (R. 5-6A)

The record will reveal that at no time did the petitioner expressly state that he *wished* to try his own case. The record *will reveal* that when petitioner appeared before the trial judge without assisting counsel, he informed him of the following:

> a) that he was confused about the trial court's order regarding the charges against him (R. 2A);
>
> b) "that he was not ready to go ahead today" (R. 3A);

c) that upon being informed by the trial judge that "we will get ready on the one year," petitioner said, "I feel it is unfair, because I cannot afford to try more than one trial, healthwise or financially" (R. 3A);

d) that he had no experience in trying a federal criminal trial (R. 4A);

e) that he knew a "little bit" about trying civil cases (R. 5A);

f) and that he didn't have the ability to handle a case like this (R. 6A).

Without more, these illustrations are sufficient to show that at no time pertinent to petitioner's constitutional and statutory right to an assisting lawyer, was the petitioner so informed.

B.

TRIAL COURT FAILED TO PROPERLY EXERCISE HIS DUTY IN FAILING TO ADVISE PETITIONER THAT THE GOVERNMENT WOULD PAY FOR AN APPOINTED ATTORNEY.

At no time before the trial or during the trial or during the sentencing did the trial court advise petitioner that he would appoint assisting counsel and that he would authorize payment of said counsel. On this very point the court in *O'Luck* v. *Rundle*, 415 Pa. 515, 204 A. 2d 439 aware of his possible misunderstanding by the accused *ordered* that the trial courts of the Commonwealth to *deliberately inform* indigent criminal defendants of the *right* to assistance of counsel *free of charge* stating (emphasis added):

> "So that the accused may fully understand his rights, it is desirable that he be informed that court assigned counsel will be made available to him without fee or charge. See Pa. R. Crim. P. 318A (adopted June 30, 1964.) 415 Pa. 526 n. 14.

In *Tollett* v. *United States*, 444 F. 2d 622, 625 (8th Cir. 1971) the court ruled that there cannot be an intelligent waiver of the assistance of counsel where the trial judge was derelict in his duty as follows:

> "There was no explanation to Tollett at that time that he was entitled as a matter of law to an attorney; no questioning of Tollett to see if he could afford an attorney; and no explanation of the desirability of having an attorney or that if he could not afford to pay an attorney, that the court would appoint one and *authorize payment by the government.*"

Under the guidelines of *Von Moltke* v. *Giles*, 332 U.S. 708, at page 723, 68 S. Ct. 316 at page 323 (1948) this Court wisely and most fairly stated:

> "• • • to discharge this duty (to determine waiver) properly in light of the *strong presumption against waiver* of the constitutional right to counsel, a judge *must* investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel does not automatically end the judge's responsibility. • • • A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

In *Johnson* v. *Zerbst*, 304 U.S. 458, 465, 57 S. Ct. 1019, 1023 (1938) this Court also recommends that

> "While an accused may waive right to counsel, whether there is a proper waiver should be *clearly* determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Applying those standards to the case at bar the trial court's inquiry was far short from *clear* nor was any determination made on the record that the petitioner intelligently, understandingly and with his eyes open waived an assisting attorney.

C.

TRIAL COURT FAILED TO EXERCISE HIS DUTY TO INQUIRE AS TO THE PETITIONER'S "FINANCIAL ABILITY" OR TO ADVISE THAT IF PETITIONER COULD PARTIALLY PAY COUNSEL THAT THE GOVERNMENT WOULD PAY THE BALANCE.

At no time did the trial court make a comprehensive or penetrating examination of the petitioner to properly determine his financial condition. *Absolutely nothing* was asked of this petitioner regarding his specific financial condition by the trial court in direct conflict to the holding in *Wood* v. *United States*, 387 F. 2d 353 (5th Cir. 1968):

> "* * * the record does not convincingly show that there was an adequate inquiry into the question of petitioner's financial ability to retain counsel, in that *the trial court should have explored the possibility that petitioner could afford only partial payment for the services of trial counsel and that counsel be appointed on that basis,* as the Criminal Justice Act permits. (See 18 U.S.C. sec. 3006 (A) (c) and (f))." (Emphasis added).

The Circuit Court of Appeals at petitioner's oral argument mistakenly informed the petitioner that since he was not a pauper at the time of the trial, he would not be entitled to assisting counsel. They reduced that misinterpretation of the law in their opinion on page 2 as follows:

> "At any rate, petitioner *may not* have been entitled to appointed counsel; he admitted at oral argument that he was not indigent at the time of trial." (emphasis mine).

The "may not" language of the Appellate Court conclusively shows that they, together with the trial court, did not indeed know the actual financial condition at the time of his trial. In order that the ends of justice would be satisfied the Circuit Court of Appeals should have ordered a remandment to determine the actual financial condition at the time of the trial to properly determine the financial ability of the petitioner if any, to partially pay for competent, effective assisting counsel as provided by law.

D.

THE COURT OF APPEALS IS IN ERROR IN HOLDING THAT ONLY PAUPERS OR INDIGENTS ARE ENTITLED TO APPOINTED COUNSEL.

The Court of Appeals at this petitioner's oral argument also informed the petitioner, mistakenly, that he would not be entitled to assistance of counsel because he was not a pauper at the time of the trial. They reduced that proposition to writing in their opinion on page 2 stating:

> "At any rate, petitioner may not have been entitled to appointed counsel; he admitted at oral argument that he was not indigent at the time of trial."

According to Moore Federal Practice, 8 A. 44-05 (2):

> "the Act 44 (b) does not use the term 'indigent' to describe the defendants entitled to legal services. It refers, rather to defendants 'financially unable' to obtain counsel.' This looser definition is to permit coverage for defendants who may have some resources, although not sufficient to retain competent counsel." See Allen Committee, *Poverty and the Administration of Criminal Justice,* 1963 at page 46.

The United States Supreme Court has advised the lower courts on this very issue in *Adkins* v. *Du Pont Co.*, 335 U.S. 331, 339 (1948):

> "*Third.* We cannot agree with the court below that one must be absolutely destitute to enjoy the benefits of the statute. * * * To say that no persons are entitled to the statutes benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. * * * We think a construction of the statute achieving such a consequence is an inadmissible one."

Additionally, the court in *Anaya* v. *Baker*, 427 F. 2d 73 (10th Cir.) at page 75 properly holds:

> "the defendant need not be indigent but instead, when the defendant lacks the financial resources which would allow him to retain a *competent* criminal lawyer at the particular time he needs one, he is entitled to appointed counsel. Representation of Defendants, 36 FRD 129, Cf. *Wood* v. *United States*, 389 U.S. 20, 88 S. Ct. 3, 19 L. Ed. 2d 20 (1967). A person accused of a federal crime (other than a petty offense) need not be destitute or indigent; he need only be financially unable to obtain adequate de-

fense. A defendant who is able to pay part of the cost of his defense will be required to do so, and only the balance will be provided." *Improving the Criminal Justice Act,* 55 Am. Bar J. 217 at 219.

"In determining whether defendant was entitled to appointed counsel, question was not whether defendant was destitute but rather whether representation essential to adequate defense was beyond his means." *Wood* v. *United States, supra.*

And in *McKelton* v. *Buno,* 428 F. 2d 718, 720 (1970):

"We concluded in *Harris* v. *Same,* 414 F. 2d 810, thus under the District of Columbia Code, as under the federal statute, in *forma pauperis* relief is *not* limited to those who are in public charges or absolutely destitute." (Emphasis mine).

The Allen Committee, in Provision of Defense Services to Defendants with Some, but Inadequate Means, page 46, (this work was the basis for the change in the federal statute omitting the word "indigent" and replacing it with "financially unable") says it better than the petitioner can:

"As developed at length in the first chapter of this Report, the Committee conceives of 'poverty' as a relative concept. A problem of poverty or financial incapacity exists whenever any service necessary to adequate defense is out of reach of the defendant, even though the accused is able to bear some of the expense of his defense . . . *these problems involve fundamental issues of justice to the individual accused and the larger public interests involved in the proper and vigorous operation of the adversary system. Whenever financial incapacity prevents the defense from providing active and creative challenges to assertions of governmental power in the criminal area, the adversary system, and the public interests depend upon it, are placed in jeopardy.*

• • • • •

> Equally acute are the problems of the accused who, at the outset of the proceedings may possess sufficient resources to meet the minimum requirements of adequate defense, but whose funds are exhausted before the end of a prolonged trial or who is unable to meet the costs of a new trial or the expense of an appeal. More than one observer has been led to the conclusion that *such a defendant may often find himself in a more dangerous position in our courts than the accused who is entirely lacking in means.* The Committee recommends as follows: Legislation should define persons eligible for appointment of counsel and other defense services at government expense as persons financially unable to obtain adequate representation. *The terms "indigency or indigent' should be avoided.* . . . Eligibility for such services necessary to his defense and should not be foreclosed by the fact that at the outset of the proceedings the accused was able to pay for some of the requirements of his defense." (My emphasis)

The petitioner found himself in that very quandary or in the dangerous position as outlined above due to his limited source of funds and not knowing, but fearing, that in the event of an acquittal he would be compelled to try the three remaining counts. If there would be a finding of guilty he needed an adequate amount to cover costs and other expenses to perfect his appeal. This is graphically shown in the following colloquy at the start of the trial:

> The Court: . . . did you discharge Miss Lavin because of financial reasons?
>
> Mr. Lacob: Yes, sir, *and the possibilities of a verdict going either way and further expenses.* (R. 5A).

Had an evidentiary hearing been held, the court would have discovered that five months after the petitioner's income tax evasion indictments were returned (sometime in 1965) petitioner was also indicted by the State of Illinois for the crime of Grand Theft(*). The petitioner was then forced into the "financially unable" category in the federal case by reason of his paying assisting counsel in the state case in advance.

Since the Government was unfairly allowed to pick their "best" year for prosecution, they quite naturally chose the calendar year 1960. For that was the year petitioner allegedly committed the state crime. The Government chose 1960 for two excellent tactical trial reasons. One, they could and did show that petitioner did not pay the complaining witness, one Gaston Nathan, his pro rata share of the proceeds of a 1960 settlement. Mr. Gaston was permitted to testify in the federal income tax case irrespective of the stipulation to the contrary. Secondly, they could and did devastatingly show that petitioner was under indictment for the crime of Grand Theft.

The Government was thereby allowed to bring forth evidence which had no tendency to prove the issues being tried, but only served to inflame the minds of the jury and caused them to believe that petitioner was a bad person, and hence was more than likely guilty of the crime charged—denying due process of law.

(*) Petitioner was acquitted of this charge and all charges in the state court but only after a finding of guilty in the federal tax case.

E.

THE CIRCUIT COURT OF APPEALS IS IN ERROR IN HOLDING THAT PETITIONER WAS AN EXPERIENCED LAWYER.

Ample evidence of the petitioner's lack of experience can be found in the colloquy wherein the trial judge, who never saw this petitioner prior to this day and most probably never heard of him prior to his being assigned petitioner's case for trial failed to appoint assisting counsel:

> The Court: Now let me counsel you again: This is *your first appearance in my Court?*
>
> Mr. Lacob: *My first case in a federal court of this nature.*(*) (Emphasis supplied).
>
> The Court: Now, I understand that you are a trial lawyer of experience and ability.
>
> Mr. Lacob: Only in personal injury, *not criminal.*
>
> The Court: Well, I used to specialize somewhat before I became a District Attorney here myself, so I recognize that you must know a little bit about trying lawsuits.
>
> Mr. Lacob: *A little bit, yes,* Judge.

And after the judge suggested that he would appoint an attorney if the petitioner liked, the petitioner replied:

> Mr. Lacob: Your Honor, I appreciate the suggestion but this field is so specialized, there is only a half dozen what I would consider competent attorneys to handle a case like this, and I am sure

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(*) The records in the federal courts will show that this petitioner never handled either a criminal or a civil trial in any federal court.

that no one in the Public Defender's Office would have that ability. I surely don't. (R. 4-5A).

The foregoing limited and totally inadequate inquiry, plus the trial judge's improper equating of his personal experiences as a federal district attorney with the petitioner's handling of personal injury cases in the state courts, hardly satisfies the requirements and standards advanced by this Court to establish a waiver. In direct conflict with the so-called "experienced lawyer" concept of the Circuit Court of Appeals For the Seventh Circuit is the opinion of the Second Circuit in a like matter decided in 1971. *United States* v. *Harrison*, 451 F. 2d 1013, 1014 deals with an income tax case wherein the pro se defendant, an attorney, was not informed of his constitutional rights but there unlike here that defendant-attorney was reasonably familiar with criminal law and had been a member of the bar since 1943. Yet the court held:

> "The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to have assistance of counsel. This has been interpreted by case law and the federal rules to mean at every stage of the proceedings. See e.g. *Von Moltke* v. *Gillies*, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1968); *United States* v. *Plattner*, 330 F. 2d 271, 274 (2nd Cir. 1964); *Schell* v. *United States*, 423 F. 2d 101 (7th Cir. 1970); Rule 44 Fed. R. Crim. Proc.
>
> (2) The only way this essential right to counsel can be waived is by giving specific instructions to the accused informing him of his rights and then by having the accused make an intelligent waiver of such rights. *Carnley* v. *Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); *Miranda* v. *Arizona*, 384 U.S. 436, 470-471, 475, 86 S. Ct. 1602 (1966);

United States v. *Curtis*, 330 F. 2d 278, 279-280 (2nd Cir. 1964).

The fact that appellant is an attorney does not necessarily mean that he is capable of adequately defending himself. (Emphasis mine).

"The mere statement by the appellant in response to the trial judge's question (six months after trial at the time of sentencing) that he was a member of the bar since 1943 and was reasonably familiar with criminal law is not sufficient to constitute waiver of his Sixth Amendment right to counsel at trial." See *Glasser* v. *United States*, 315 U.S. 60, 70-71, 67 S. Ct. 457, 86 L. Ed. 680 (1942).

"We must note here, as a matter of *judicial knowledge* that most lawyers have only scant knowledge of tax laws."

so stated the court in *Bursten* v. *United States*, 395 F. 2d 981 (5 Cir. 1968) and again on page 985:

"We must note that a lawyer-defendant in an income tax evasion case is held to no higher duty of knowledge of the tax laws than any other defendant."

and in *Powell* v. *Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 64 (1932) this Court held the following standards applicable to a layman:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining whether the indictment is good or bad. He is unfamiliar with rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issues or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the helping hand of counsel at every step in the proceed-

> ings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Applying the standards in the *Powell* and *Harrison* cases, *supra*, and after examining the entire trial proceedings, the petitioner submits that these standards are also applicable to him. The petitioner was inexperienced in the criminal law; inexperienced and totally unfamiliar with federal criminal law; he had scant knowledge of tax laws; inexperienced and totally unfamiliar with the rules, statutes and court procedures in the federal court; incapable of introducing and excluding incompetent evidence; lacked skill and knowledge in preparing and submitting a defense, even though he had a perfect one. With these required skills and the protection of a solicitous trial court, the petitioner faced certain conviction because he did not know how to establish his innocence. As the court in the *Harrison* case, *supra* cogently states a "little bit" of civil trial experience in the state courts "is not sufficient to constitute a waiver of his Sixth Amendment right to counsel at trial . . . his constitutional guarantees cannot be discarded so easily."

F.

THE TRIAL COURT FAILED TO INQUIRE OF THE PETITIONER AS TO HIS KNOWLEDGE, IF ANY, OF THE NATURE OF THE CHARGES AGAINST HIM.

Although the holding that it is reversible error for the trial court to fail to inquire of the accused as to his knowledge, if any, of the nature of the charges against him was obtained in an acceptance of guilty case, by this Court. *McCarthy* v. *United States*, 394 U.S. 459, 89

S. Ct. 1166, 22 L. Ed. 2d 418 (1969). Petitioner submits that the determination of an understanding and intelligent waiver is the paramount issue and a knowledge and understanding of the nature of the charge is certainly specifically applicable to a "waiver of counsel" situation, as here. *Von Moltke* v. *Giles*, 332 U.S. 708 clearly states that a "valid waiver *must* be made with an apprehension of the *nature of the charges* * * * a judge can make certain that an accused's professed waiver of counsel is made only from a *penetrating* and *comprehensive* examination of all the circumstances under which such a plea is tendered. Here the judge was neither penetrating nor comprehensive, he asked absolutely nothing of this petitioner of his knowledge, if any, of the nature of the charges—he deliberately concealed from this petitioner his intentions of what disposition he was going to make of the three remaining charges in the event of an acquittal.

G.

THE TRIAL COURT FAILED TO INFORM THE PETITIONER OF POSSIBLE DEFENSES TO THE CHARGE.

In *McGee* v. *United States*, 355 U.S. 17, 78 S. Ct. 64 (1967) this Court remanded to the district court for plenary hearing, *inter alia*, a claim that at the time counsel was "waived" the district court *failed* to inform the accused of possible defenses to the charge. (Emphasis mine).

Von Moltke, *supra*, holds inter alia that in order for a waiver to be valid, "such waiver *must* be made with knowledge of possible *defenses to the charges* and circumstances in mitigation thereof, and all other facts es-

sential to a broad understanding of the whole matter." And once again a waiver can be determined only after a *penetrating and comprehensive examination* by the trial judge." (Emphasis mine).

The trial judge asked absolutely nothing regarding defenses nor advised the petitioner regarding defenses or circumstances in mitigation thereof, as required.

If all the foregoing proceedings are sufficient within the meaning of *Johnson* v. *Zerbst*, 304 U.S. 458 to assure the court of an "intelligent waiver", then the only inquiry a trial judge need ever make is whether the "financially unable" accused to pay desires the government to furnish him a lawyer. If the accused answers, "No, I think not", then that will suffice. This petitioner believes that the absence of inquiry in this matter will not suffice under the law nor will this Court condone it.

H.

THERE WAS NO WAIVER OF ASSISTANCE OF COUNSEL AT SENTENCING IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHTS.

Mempa v. *Rhay*, 389 U.S. 128, 135, 88 S. Ct. 254, 257, holds the truism that "The Sixth Amendment confers the right to counsel at time of sentencing." "It is well settled that where assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on request." *Cochran* v. *Carnley*, 369 U.S. 506, 513, 82 S. Ct. 884, 889, 8 L. Ed. 2d 70 (1962). The record in the case at bar is silent but if the trial court assumed that there was a waiver of counsel in the original trial he had no constitutional right to carry over the alleged waiver automatically to the separate crim-

inal proceedings of sentencing. To do so is irreconcilable with the doctrine that waiver must be intelligently and knowingly made or as formulated in *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1937) there must be an "intentional relinquishment or abandonment of a known right or privilege". At no time during the sentencing did the trial court advise or make it known to the petitioner that he had the constitutional right and the statutory right under Rule 44 of the Federal Rules of Criminal Procedure to have an attorney assigned to represent him *at every stage of the proceedings.*" This is still another denial of the due process of law. The trial judge's abuse of discretion in the sentencing procedure aside from the foregoing will be covered in this petition later.

Concluding the "waiver of counsel" point this Court in *Adams* v. *U. S. ex rel McCann*, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1946) stated:

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that *fairness dominates the administration of justice.* An accused must have the means of presenting his best defense. Essential fairness is lacking if an accused cannot put his case in effectively."

The petitioner submits that instead of fairness, *unfairness*, as shown, dominated the entire administration of justice. With the denial of petitioner's constitutional right to effective assistance of trial and sentencing counsel, petitioner was precluded the effective means of presenting his best defense or any defense due to peti-

tioner's inability to cope with the Government and the disgruntled trial judge whose magnificent judicial bargain of 60 days was declined—but who imposed a sentence in accordance with his standing policy of over 30 year duration of some 17 times as severe for defying the court by requesting a trial.

As the trial judge stated at the sentencing:

> "The jury deliberated only 45 minutes. In my opinion they could have voted without leaving the box." (R. 4B).

II.

THE COURT OF APPEALS IS IN ERROR IN HOLDING THAT PETITIONER DELIBERATELY BYPASSED FEDERAL PROCEDURES AND THAT CONSTITUTIONAL DEPRIVATIONS CANNOT BE HEARD IF NOT RAISED ON DIRECT APPEAL.

The petitioner represents to this Court that the only points contained in this petition that were disposed of on direct appeal are II F regarding the reputation witnesses—but the specific point contained herein was not litigated. The other point is II G, petitioner was compelled to testify in violation of his Fifth Amendment rights. On direct appeal, however, illustrations of the trial court's specific pressure to take the stand, was not covered. *All other points* infringing on petitioner's right to a fair trial were not covered. For it was in prison that petitioner learned of the constitutional deprivations for the first time and consequently did not deliberately bypass the direct appellate procedures. Before there can be a deliberate bypass there must be knowledge of the deprivation as this Court clearly stated in *Kaufman* v. *United States*, 394 U.S. 217 (1969):

"it must be clearly understood that ordinary procedures for review were available to him. ** * depends on the considered choice of the petitioner, a choice made by counsel not participated in by the petitioner does not automatically bar relief. *Fay* v. *Noia*, 372 U.S. 391, 439, 83 S. Ct. 822, 849 (1963). Ordinarily, a hearing must be held to determine the facts relied upon to show a deliberate bypass as well as their legal sufficiency. *Id.* * * * the function of habeas corpus is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the *very gravest of allegations* * * * therefore when an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive the evidence and to try the facts *anew*." (Emphasis mine).

Although this Court is referring to habeas corpus, the petition under §2255 is treated the same as habeas corpus. Additionally, this Court in *Sanders* v. *United States*, 373 U.S. 1, 83 S. Ct. 1068 (1963) confirmed the principle that motions of *res judicata* have no bearing on section 2255 inquiries. Therefore the fact that a point was not raised in the original appeal is no bar to later consideration. Secondly, even if certain grounds for relief were disposed of adversely to the petitioner a redetermination may become necessary to serve *the ends of justice*. Petitioner has and will allege exceptional circumstances to allow a redetermination of any point already disposed of but which constituted a gross miscarriage of justice or where the trial court has departed so far from the accepted and usual course of inherently fair judicial proceedings." In *Fay* v. *Noia*, 372 U.S. 402:

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If government is always to be accountable to the judiciary for a man's imprisonment."

And as Mr. Justice Holmes in his dissent so wisely stated in *Frank* v. *Mangum*, 237 U.S. 309, 348; 35 S. Ct. at 595:

> "It is of historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void."

A & B.

PETITIONER WAS DENIED DUE PROCESS OF LAW BY VIRTUE OF IMPROPER JUDICIAL BARGAINING AND COERCION OF STIPULATION.

The petitioner in his *sworn* 2255 petition stated the fact to be that his then trial attorney, Miss Anna R. Lavin, informed him that the trial judge at an in camera discussion offered petitioner a sixty day sentence in exchange for a plea of *nolo contendere.*

After the petitioner professed his innocence and refused the judicial bargain and requested trial the trial judge, in a final effort to save court time, indicated by way of an ultimatum that if petitioner stipulated to the Government's exhibits, he would take that into consideration at the time of the sentencing. This Court should note the prophetic foregone conclusion, *at the time* of sentencing.

Regarding the propriety of the judicial bargaining and intimidation petitioner refers this Court to *Brown* v. *Beto,* 377 F. 2d 950 (1969):

> "There are a number of valid reasons for keeping the trial judge out of the plea discussions, including the following:
>
> (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial before this judge and
>
> (2) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of presentence investigation report and
>
> (4) the risk of not going along with the disposition apparently desired by the judge. • • •"

In *United States* v. *La Valle,* 319 F. 2d 308, 319 (1963) the trial judge there as here ordered a conference outside the presence of the defendant for plea discussions. On review it was held on p. 319 that:

> "Our concept of due process must draw a distinct line between, on the one hand, advice from and 'bargaining' between defense and prosecuting attorneys and, on the other hand, discussions by judges who are ultimately to determine the length of sentence to be imposed. This is especially true, when as here, the conference is ordered by the judge himself without any apparent request by the defendant or the prosecution." (emphasis mine)

Petitioner states the fact to be that his attorney did not request any such conference nor did the prosecutor.

Again in *Scott* v. *United States,* 419 F. 2d 264 (1969) at page 273:

> "If inducements are to be offered for guilty pleas, there are strong reasons why the court should not be a party to them. The trial judge may sacrifice his ability to preside impartially at trial by becoming too involved with pretrial negotiations. Even if he does not, *it may so appear to the defendant. It is important not only that a trial be fair in fact,* but also that the defendant believe that justice be done. *The accused may fairly doubt this if he thinks the judge begrudges him the exercise of the right to trial.* Moreover, the defendant's uncertainty concerning the expectations or wishes of the judge will prevent his exercise of the best judgment in deciding upon a plea."

Pertinent to the "begrudging" aspect of this case petitioner respectfully submits the thinking of the trial judge at the motion for reduction of sentence heard on April 6, 1970 and appearing on page 4C of the trial record:

> The Court: No, I will deny the motion for any change in the sentence. I did not take into consideration the State Court charges at all in the imposition of sentence, and in checking of the records here will disclose that *for the last 30 years I have imposed between three and five years on every income tax case that has gone to trial.*
>
> Now, *on plea of guilty, I have given considerably less.* On every income tax that has gone to trial, I have imposed that.
>
> So the sentence imposed here is consistent with the standing policy of this court and of the entire court. (Emphasis mine).

The abuse of discretion in the judge's sentencing procedure will be covered later in this appeal.

The compelling pressure to stipulate to the government's exhibits allowed the government to introduce into evidence 69 settlement checks issued in 1960 for a total of $38,322.89 by 29 different insurance companies for cases in which the defendant (petitioner) possibly represented injured persons. Some of the 69 checks were made out to the order of the petitioner's employer. By virtue of the coerced stipulation the Government did not have the same burden the petitioner had of laying a proper foundation for the introduction of the checks; nor were they compelled to substantiate said checks with files, invoices or books or records; nor were they compelled to find many of the claimants who could not be found at this date thereby violating petitioner's 6th Amendment right "to be confronted with the witnesses against him".

There were no reasons given for the exclusion of the petitioner's check exhibits to off-set said 69 checks but the reviewing court held that the petitioner failed to bring in any files, records or invoices to relate to said expense checks. What the reviewing court did not know was that the petitioner requested a short continuance in order to bring said evidence to court and the trial court stated, "You may not". (Trial record, page 572). Of course there was no stipulation to admit into evidence the petitioner's off-setting expense checks.

To deny the compelling force of the following promise of the trial judge is to deny the reality of the experience:

> The Court: I have given you the minimum of three years. (There is no minimum under a conviction of the charge herein)
>
> Mr. Lacob: Nothing for the stipulation or the promise?

The Court: *Yes, two years.* You would have gotten five otherwise. (Emphasis mine) (8C of the Trial Record).

"A judge's prime responsibility is to maintain the integrity of the judicial system; to see that due process of law, equal protection of the laws and the basic safeguards of a fair trial are upheld.

* * * * *

Finally, a bargain agreement between a judge and defendant * * * has no place in a system of justice." *United States* v. *Gilligan,* 256 F. Supp. 244 (1966)

The stipulation predicated upon the judge's promise by its very nature does not qualify as a free and voluntary act of the petitioner . . . after all he stipulated his case away. This Court is reminded that this is the very trial judge before whom this petitioner allegedly waived effective assistance of counsel.

C.

PETITIONER WAS DENIED DUE PROCESS BY VIRTUE OF TRIAL JUDGE SEVERING COUNT III AND ALLOWING SEVERED COUNTS TO BE CONSIDERED BY THE JURY.

The trial court imposed an impermissible burden on the petitioner by forcing the government to pick their best year for prosecution.

Mr. Lacob: I have been in this case representing myself now about a week or two, and I looked over the Court's file and I notice that there is an order for the Government to elect to proceed on a year, but there is language in there that is confusing to me.

It says, "First", which implies to me there might be subsequent trials on this matter.

The Court: What did I rule on that?

Mr. Jalovec (prosecutor): Your Honor, the ruling of your Honor was that the Government would elect to proceed on one count first. Depending on that result, we would hold the other three counts in abeyance.

The Court: In other words, I don't want to go through too long a trial and then, if, however, the verdict should be guilty on there, I would naturally dismiss the others.

Mr. Lacob: Yes, but on the other hand, your Honor if it's not guilty, I have got to go through another trial.

The Court: You want to leave them all together?

Mr. Lacob: I certainly do. But, your Honor, in any event, I am not ready to go ahead today, because my accountants didn't receive my checks for the year 1960 until I got into the case. Now there are three more years involved here. I have had no stipulation with counsel for the Government.

The Court: I think we will get ready just on the one year.

Mr. Lacob: I am objecting to that your Honor, and I feel that it is unfair, because I cannot afford to try more than one trial, health-wise or financially. (R. 2-3A)

Granted, the issue of repeated trials became moot upon the finding of guilty but it is petitioner's contention that the trial court was in a dilemma in the event of an acquittal and consequently a finding of guilty was obtained as evidenced by the many fundamental right errors shown in this petition. Adding to the gross miscarriage of justice during the trial was the trial court's allowance

of the Government's introduction of matters relating to other taxable years in the presence of the jury and in its prejudicial closing argument. (R. 25, 26, 27, 28, 32, 439, 440, 448, 449, 465-467, 476, 479-481, 514, 33D-36D).

In *Flemister* v. *United States*, 260 F. 2d 513 (5th Cir. 1958) the court held that it was reversible error for the jury to hear evidence of understatements of income as to a taxable year *not in issue*. (Emphasis mine). Implicit in that decision is the prejudicial effect the prior and subsequent years have on the current criminal prosecution. The manifest injustice comes sharply into focus where, as here, petitioner's income tax returns for the prior indicted years, 1958 and 1959 and subsequent year, 1961 was introduced before the jury by the Government. Thusly, the Government was able to completely destroy the petitioner's credibility and to show a course of conduct establishing willfulness, intent, evasion and failure to report in other years as well. The net result of which created an additional onerous burden upon the petitioner of defending against evasion charges which were supposed to be excluded. But there is yet another reason why this Court should exercise its supervisory power here. The trial court taking advantage of the inexperienced pro se petitioner actually instructed the jury as follows:

> . . . in determining whether the defendant acted wilfully *the jury may consider* along with the other evidence in *the case defendants prior and subsequent acts relating to his income tax obligations. Such evidence may indicate whether he intended to evade the law*. (Tr. R. 649; emphasis mine).

In *Bruton* v. *United States*, 88 S. Ct. this Court on this point stated:

> "The Government should not have the windfall of having the jury influenced by evidence against which, as a matter of law, they should not consider and could not put out of their minds."

At no time did the trial court specifically instruct the jury to disregard the other years nor did he keep his promise to the petitioner that "I don't think that you are going to suffer for it" (R. 4A).

D & E.

DUE PROCESS WAS DENIED PETITIONER BY VIRTUE OF THE TRIAL COURT DISALLOWING SIDE BAR CONFERENCES AND FAILING TO GIVE REASONS FOR HIS RULINGS.

The petitioner did not expect a perfect trial, only a fair one. Supplementing the many instances of the lack of due process of law already shown, petitioner must augment this petition with still another failure to afford a fair trial. The trial court by his decree, "I don't have side bar conferences" (R. 24) and failing to give any reasons for any of his rulings precluded and further disabled the inexperienced pro se petitioner from properly preparing and introducing a defense, thus vitiating all of his constitutional safeguards.

As the court in *Carroll* v. *United States*, 326 F. 2d 72 (9th Cir. 1963) stated:

> "A decent regard for the rights of a defendant in a criminal trial, particularly in a complex case where arguments as to admissibility of evidence, especially its relevance, is bound to involve assertions by the prosecutor as to how the evidence bears upon the

> issues that the jury must decide and what it will prove to the jury, should lead the court to incline toward holding such arguments out of the presence of the jury. This can be done either at the bench or by excusing the jury."

In accord with the above proposition is the court in *Eirman* v. *United States*, 46 F. 2d 46 (10th Cir. 1963):

> "It is our conclusion that the better practice is to hear evidence bearing upon the admissibility of other evidence out of the presence of the jury • • •".

The "no side bar" order caused:

> "subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the trial judge. Every trial judge and trial lawyer is aware of jurors sensitivity to the attitudes of counsel in their disagreements with the trial judge." *United States* v. *Schartner*, 426 F. 2d 470 (1970).

> "the influence of the trial judge on the jury is necessarily and properly of great weight, *Starr* v. *United States*, 153 U.S. 614, 626, 14 S. Ct. 919, 38 S. L. Ed. 841, 923—and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is the part apt to be the decisive word". *Bollenbach* v. *United States*, 326 U.S. 607, 612, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1946).

The additional obstacle of the "no side bar conferences" promulgation made by the trial judge early in the proceedings, foreclosed the petitioner from stating his objections and comments outside the presence of the jury and consequently prejudiced the proper conduct of the trial.

Petitioner was further specifically prejudiced when the Court allowed the Government to argue law and state

prejudicial reasons why the petitioner's off-setting expense checks should not be admitted into evidence in the presence and hearing of the jury. After the argument relating to the said checks, the trial court ruled against the admission of almost every check and as far as the petitioner's defense was concerned it was all over.

F.

THE TRIAL COURT UNDULY DISALLOWED REPUTATION WITNESSES FROM TESTIFYING TO PETITIONER'S REPUTATION IN THE COMMUNITY WHERE HE WORKED.

The trial court unduly restricted all reputation witnesses to petitioner's reputation in the community where he lived. When petitioner offered reputation testimony in the community where he worked the following took place:

By Mr. Lacob: Q. Judge, let me ask you this: What was my reputation in the professional community in the year 1960? as to my truth, honesty, integrity and veracity?

Mr. Jalovec: Objection, your Honor: *improper question.*

The Court: Make it not only professional—you may include professional, but the question should state, "in the community in which you reside."

Q. (by petitioner) Would you incorporate in that same question, "in the community in which I reside?"

A. Well, your reputation, so far as I am concerned is only based on my observations of your conduct in the trial of cases that you were actually engaged in.

Q. What was that opinion, Judge?

Mr. Jalovec: Objection. Based on the witness' answer he doesn't know anything about the community in which the defendant resides.

The Court: I would have to sustain the objection.

Mr. Lacob: I have no further questions. (R 376-7).

The trial court was held to be in error when it excluded proffered evidence of petitioner's reputation where he worked, so stated a 7th Circuit Court of Appeals in *United States* v. *Parker*, 447 F. 2d 826 (7th Cir. 1971):

> "The witnesses were qualified to testify to appellant's reputation in the community in which he had been employed for many years, but not to his reputation in the community where he resided. • • • We believe the court's reference (in *Michaelson* v. *United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168) to 'the community in which he has lived and the broad circles in which he has moved' is broad enough to encompass the circles, in which a defendant has been employed, as well as his social relationships. In today's complex urban society, a man's reputation among co-workers may well be more significant than his reputation among neighbors. . . . We believe the better rule is that the 'testimony may extend to the reputation of the witness for truth and veracity in the community where he works as well as that in which he has his home.' *State* v. *Axilrod*, 248 Minn. 204, 79 N.W. 677, 682 (1956) • • • the Proposed Rules of Evidence for the United States Courts and Magistrates (revised draft March, 1971) seems to adopt an approach to proof of character which completely eschews the community reputation. See Proposed Rule 405 and Advisory Committee's Note thereto."

It is petitioner's contention that this error coupled with the following prejudicial closing argument made by the

Government vitiated the testimony of the character witnesses and denied petitioner due process and equal protection of the law.

> "Now, the defendant, ladies and gentlemen, then brought on so-called character witnesses who were going to testify to what his character was. His *Honor will instruct you on this also.* The instruction basically states, ladies and gentlemen, that if the defendant introduces evidence of *good reputation in his community,* in his community. *Did one of his character witnesses know where he lived? They didn't.* • • •" (R. 32-33D) (My emphasis).

G.

THE PETITIONER WAS COMPELLED TO TESTIFY IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS.

In *Redfield* v. *United States,* 315 F. 2d 76 (9th Cir. 1963), the Court stated:

> "The privilege against self incrimination not only forbids employment of judicial process to require a defendant to testify (*Adamson* v. *California,* 332 U.S. 45, 50, note 6, 67 S. Ct. 1672, 91 L. Ed. 1903), but also forbids the court or the prosecution from placing the defendant in a position where he must testify in order to avoid an adverse inference on the part of the jury.
>
> Accordingly, the right may be violated by an official statement in the presence of the jury that the defendant is entitled to testify (*McNight* v. *United States,* 6th Cir. 115 F. 972), or by an official suggestion take the stand or make an admission. See *Johnson* v. *United States,* 318 U.S. 189, 197, 63 S. Ct. 549, 87 L. Ed. 704; *Boyd* v. *United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746."

The forbidden conduct expressly prohibited in the above cases were employed here commencing with petitioner's opening statement to the jury:

> The Court: *Are you going to testify to this?* (R. 11)

And still again:

> The Court: *Confine yourself to what you are going to testify to* or what the evidence will show with reference to this particular case. (R. 14) (Emphasis added).

And again by the trial court in the presence of the jury when Government witness Bolnick was being cross examined:

> The Court: Sustained, *not only that, this is something you (petitioner) can testify to.* (R. 269). (Emphasis added).

Observe how the trial judge, who during the entire trial failed to give any reasons to the pro se petitioner for his rulings, volunteered that the petitioner take the stand.

And once again during the direct examination by the petitioner of his wife: the prosecutor and the trial judge who literally *forced* the petitioner to take the stand:

> Mr. Jalovec: Objection, your Honor. This is, if the defendant made them out (referring to the offsetting expense checks) he should be the one to testify to them!

Now we have the Government prosecutor "placing the petitioner in a position where he must testify in order to avoid an adverse inference on the part of the jury". In direct conflict with the *Adamson* case, *supra*. And if

this isn't enough observe the compelling circumstances of the very same infraction from the trial judge during the same examination in the presence of the jury:

> **Mr. Lacob:** Not necessarily judge, your Honor. These are made in the regular course of business.
>
> **The Court:** Did you make them out?
>
> **The Witness:** No, but I saw my husband make them out.
>
> **The Court:** At home?
>
> **The Witness:** Some of them. Most of them.
>
> **The Court:** Well, if you represent these are your checks and you made them out, I will accept that representation. I don't think she is qualified.
>
> Mr. Lacob: May I make the representation in Court that I made them out, they are all in the ordinary and regular course of business.
>
> The Court: *Then you want to cross examine him on it?*
>
> Mr. Lacob: May I take the stand for that limited purpose only?
>
> The Court: Take the stand for whatever purpose you want to, certainly. (R. 418-419)

When petitioner responded to the trial judge's inquiry, that the checks were made in the ordinary and regular course of business, petitioner never dreamed that the trial judge would counter with the prejudicial, commanding suggestive language to the prosecutor: "Then you will want to cross examine him on it?" Petitioner had no other course, he was directed to take the stand. Had petitioner been a skilled, experienced criminal trial lawyer, a motion for mistrial would have been proper.

Petitioner is mindful of the "strained" theory employed by the Government and incorrectly and unfairly bought by the reviewing court in that petitioner waived his privilege against self incrimination by his openng statement and the suggestive questioning of witnesses. This theory is unfair because the reviewing court was not made aware of the following on the direct appeal:

a) that the prosecutor in his closing argument informed the jury as follows:

> "During my opening argument, ladies and gentlemen, I told you that *the only testimony you are to consider as evidence is that which comes from the very witness stand when someone takes the stand, raises their hand and says, 'I swear to tell the truth'*". My opening statement was not evidence, nor is my closing argument now. And, *more importantly, neither was the defendant's opening statement evidence and neither is his closing argument.*" (Tr. R. 4D) (My emphasis).

b) that the jury was specifically instructed by the trial judge as follows:

> "The jury may consider *only the evidence properly admitted.* Evidence includes *sworn testimony,* exhibits admitted into the record, facts stipulated by counsel, and facts judicially noticed by the court." (Tr. R. 654) (My emphasis)

H.

DUE PROCESS WAS DENIED PETITIONER BY VIRTUE OF BEING FORCED TO IMMEDIATE TRIAL WITHOUT ASSISTING COUNSEL.

On the day the matter was called for trial and the petitioner appeared without counsel he advised the court that he was not ready to proceed on that day. The Court induced the pro se petitioner to agree to proceed with a fatherly type promise. "I don't think you are going to suffer by it". (R. 4A)

Then again during the first days of the trial petitioner pleaded surprise to the Government employing a "bank deposit" theory of prosecution contrary to the answers given by them in the bill of particulars as follows:

> "Mr. Lacob: • • • There is nothing in here regarding bank deposits. On the basis of that, your Honor, *I am not prepared to go ahead. I need at least two weeks to properly prepare this case for trial.* • • •.
>
> The Court: Any other objections?
>
> Mr. Lacob: No.
>
> The Court: The objections to the exhibits are each and all overruled. (R. 48-49).

And again on page 55 of the trial record:

> Mr. Lacob: • • • I think as it is going in now, it is prejudicial, and *I am still asking for time to properly go over these with my accountant.*
>
> The Court: The motion is denied, the objections are overruled and they will be received in evidence. (Emphasis mine)

White v. *Ragen*, 324 U.S. 760 held:

> "It is a denial of the accused constitutional rights to a fair trial to force him to trial with such expedition as to deprive him of the effective aid of assisting counsel".

I.

THE TRIAL COURT GROSSLY ABUSED ITS DISCRETION IN IMPOSING SENTENCE.

The petitioner was sentenced under 26 Internal Revenue Code section 7201. The sanctions thereunder are as follows:

> "• • • upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, together with the costs of prosecution".

The trial judge arbitrarily ignored all conventional factors in deciding a proper sentence. In imposing sentence the trial judge made the following comments:

> "• • • checking of the records here will disclose that for *the last 30 years I have imposed between three and five years on every income tax case that has gone to trial.* (R. 4C).
>
> *Now, on a plea of guilty, I have given considerably less.* On every income tax case that has gone to trial I have imposed that.
>
> So the sentence imposed here is consistent with the standing policy of this Court and of the entire Court. (R. 4C).
>
> "*I am giving you the minimum* that I would give for one year on trial on an income tax case, and I have extended the consideration that I said I would."

(R. 6C). (The consideration refers to the promise for the coerced stipulation).

"I should say to you, and I will hear anything you wish to say, but I should at this time announce that I am considering sentence only on the basis of the income tax violation . . . *not on the basis of any other thing.* (R. 7C) (My emphasis).

Congress set no minimum period of imprisonment for this violation yet this judge arbitrarily created his own minimum, of 3 years in every income tax case that has gone to trial. The rigid, inflexible "over 30 year 'standing policy' of imposing between three and five years in every tax case that goes to trial" by the trial judge is a dangerous precedent. He deliberately ignores the "individualized sentencing" procedures of this Court are set out over twenty years ago in *Williams* v. *New York*, 337 U.S. 248, 69 S. Ct. 1079 (1949):

"The belief no longer prevails that every offense in a like category calls for an identical punishment without regard to the past life and habits of the offender. Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. In *Burns* v. *United States*, 287 U.S. 216, 220, 77 L. Ed. 266, 53 S. Ct. 154, 'It is necessary to individualize each case, to give that careful and comprehensive to the particular situation of each offender which would be possible only in the exercise of a broad discretion.' In *Pennsylvania, ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55, 82 L. Ed. 43, 46, 58 S. Ct. 59, this Court further stated: 'For the determination sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the

> offense together with the character and propensities of the offender."

The trial judge by ignoring probation reports and possible reformation and rehabilitation of the wrong-doer in his avowed sentencing procedure is unjustifiably in error. The late Federal Judge Lewis B. Schwellenbach in his article, Information vs. Intuition in the Imposition of Sentence, 27 J. Am. Jud. Soc. 52 (1943) states:

> "The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment. There is no substitute for information. The sentencing judge in Federal court has the tools with which to acquire that information. *Failure to make full use of those tools cannot be justified.*" (Emphasis mine).

The sentencing procedure employed here presents a serious wrong that has not been, but should be categorically prohibited by this Court. The trial judge at bar is not the only Federal judge employing these improper procedures. In *United States* v. *Daniels,* 446 F. 2d 967 (5th Cir. 1971) another senior trial judge sentenced a member of the Jehovah's Witness faith and a conscientious objector to five years imprisonment for failure to obey or comply with his local draft board's order. The Circuit Court of Appeals of that Circuit sustained the conviction upon review but remanded to permit reconsideration of the sentence. Upon remand the District Court trial judge refused to reduce or suspend its original five year sentence just as the trial judge in the issue at bar refused to do in a remandment of an improper sentence imposed by him in *United States* v. *Wiley,* 184 F. Supp. 679 (1960). The trial judge justified his five year sentence in the conscientious objector case as follows:

"that for over thirty years that he had been on the federal bench he has felt that in cases of this kind * * * those who violated that order deserve a five year sentence; and I think almost without exception, I have given a five year sentence."

The Court of Appeals in the *Daniels* case *supra* stated on page 969:

"The sole issue on appeal is whether the District Court *properly discharged its duty to impose an appropriate sentence. Williams* v. *Oklahoma,* 358 U.S. 576, 585, 79 S. Ct. 421, 3 L. Ed. 2nd 516 (1959). See *Ivers* v. *United States,* 185 F. 2d 807, 809 (6th Cir. 1950).

The process of sentencing an offender, however, *is not wholly immunized from judicial review solely because the sentence imposed upon the offender falls somewhere within certain statutory limits. Williams* v. *Oklahoma,* 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 5196 (1969); *Williams* v. *New York,* 337 U.S. 241, 69 S. Ct. 1079; *Townsend* v. *Burke,* 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). In *Townsend* v. *Burke, supra,* the United States Supreme Court held an appellate court may scrutinize the sentencing process *to insure that the trial judge has based his decision on reliable information.*

On the other hand, we and other courts have approved remanding for resentencing in cases where it appeared that a trial judge had improperly considered certain factors in sentencing, or *grossly abused his discretion by failing to evaluate the relevant information before him with due regard for the factors appropriate to sentencing. Yates* v. *United States,* 356 U.S. 363, 366-367, 78 S. Ct. 766 (1958)

* * * * *

We are unable to understand how the trial judge could have fairly considered all of the circumstances surrounding the commission of the crime and the

past life and habits of the Appellant that he is obliged to consider and impose the identical punishment he has been handing down for thirty years in "cases of this kind". Williams v. *Oklahoma, supra* and *Williams* v. *New York, supra.*

Second, the District Court may not wholly justify its seemingly mechanical imposition of five year sentences on all those who violate • • • The United States Congress did not provide that every violation of • • • shall be punishable by no less than five years. Hence • • • is an express legislative sanction of the practice of meting out sentences substantially less than five years in prison • • • in situations where there are proper mitigating circumstances." (Emphasis mine).

The trial judge's sentence in the matter at bar, stripped of all legal parlance, boils down to additional punishment for petitioner exercising his constitutional right to a trial and defying the judicial bargain. Precedents and mitigating factors are not of any moment to the trial judge—the saving of court time, was the sole consideration. And it is interesting to note that the Circuit Court of Appeals of the Seventh District never even bothered to rule on this sentencing issue.

CONCLUSION.

The most degrading, humiliating experience any human being, rich or poor, intelligent or not, lawyer or layman, can endure is a deprivation of one's personal liberty. To permit this under the compelling circumstances that existed before and during the petitioner's trial, without any competent legal representation whatsoever is a mockery of American judicial system and the law. A mockery that petitioner who spent eleven months in prison; who was suspended from his chosen profession which he practiced honorably for over twenty years and whose reputation, character and livelihood were virtually destroyed—does not and will not believe that this Court will allow the wrongful conviction to prevail. Petitioner therefore respectfully prays that this Court will grant the issuance of the Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit, or to afford any other equitable relief that it deems meet.

Respectfully submitted,

SEYMOUR LACOB, *pro se*
1407 Bunker Road
Flossmoor, Illinois 60422

APPENDIX A

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

Wednesday, April 28, 1971

Before

Hon. WILLIAM J. CAMPBELL, *District Judge*

SEYMOUR LACOB,

Plaintiff-Appellee,

No. 71 C 924 vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

The motion and files and records of the case conclusively show that the petitioner is entitled to no relief: Accordingly, the motion pursuant to 28 U.S.C. 2255 is denied and the cause is dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 23, 1972

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

SEYMOUR O. LACOB,

Petitioner-Appellant,

No. 71-1457 vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 924
WILLIAM J. CAMPBELL, *Judge.*

ORDER

Petitioner moved the court which imposed his sentence to vacate the sentence under 28 U.S.C. §2255. The facts are set forth in the opinion affirming his conviction on direct appeal. *United States* v. *Lacob*, 416 F. 2d 756 (7th Cir. 1969) *cert. denied*, 396 U.S. 1059, *rehearing denied*, 397 U.S. 1003 (1970). We affirm the district court's denial of the motion and dismissal of the petition for relief.

Virtually all the alleged errors relied on by the petitioner were raised and specifically disposed of, or could have been raised, on his direct appeal. *Levine* v. *United States*, 430 F. 2d 641 (7th Cir. 1970), *cert. denied*, 401 U.S. 949 (1971). The Supreme Court has said that "the §2255 court may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal." *Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8 (1969).

Petitioner was represented by counsel in the proceedings prior to trial. A lawyer himself who specialized in personal injury claims, he chose to defend himself at the trial and his counsel of record was permitted to withdraw. In this petition he has complained that he lacked effective counsel, partially because of actions taken by his counsel before her withdrawal and partially because of his own alleged inadequacy. In regard to his retained counsel, she is one of the most active criminal lawyers in this area and her actions on petitioner's behalf were clearly matters of strategy pursued in good faith for petitioner's calculated best advantage.

As to his self-representation, the petitioner was repeatedly cautioned by the trial court that, even though he was a lawyer, he would be well advised to engage counsel to assist him with the trial. Petitioner repeatedly spurned this advice.

At one point, the trial court asked petitioner if his reason for discharging his attorney was financial. He replied that it was, along with other reasons. The trial judge then offered to appoint either someone from the

Federal Defender's Office or the attorney he was discharging. Petitioner declined. He now claims that he would not accept an appointed attorney because he thought that attorney would have to work without fee. His colloquy with the trial court, however, does not evidence a lack of understanding that an appointed attorney would be compensated. We *find it impossible to believe* that an experienced lawyer could reach the trial stage in a criminal proceeding against him under such a misapprehension. At any rate, petitioner may not have been entitled to appointed counsel; he admitted at oral argument that he was not indigent at the time of his trial.

On his direct appeal, he re-engaged the same attorney whom he had earlier permitted to withdraw. In his own mind he had ratified his attorney's earlier actions and strategy judgments. He also had the benefit of her preparation of his appeal, wherein his present alleged errors were either raised or could have been raised.

The denial of the petition is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 13, 1972

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

SEYMOUR O. LACOB,

Petitioner-Appellant,

No. 71-1457 vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 924

It Is Ordered by the Court that the petition for rehearing filed in the above-entitled cause be, and the same is hereby denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages contain a true copy of

1. Per Curiam Order entered February 23, 1972 affirming U.S. District Court's denial of the Petition.
2. Appellant's Petition for Rehearing filed March 8, 1972.
3. Order entered March 13, 1972 denying Petition for Rehearing.

Cause No. 71-1457

SEYMOUR O. LACOB, *Petitioner-Appellant*,

vs.

UNITED STATES OF AMERICA, *Respondent-Appellee*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of March A.D. 1972.

/s/ William H. Pittman
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States provides as follows:

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI—Jury Trial For Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of Counsel for his defence.

Title 18 U.S.C. Section 3006 A (b) provides as follows:

> (b) *Appointment of counsel.*—In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States magistrate or the court shall appoint separate counsel for defendants who have such conflicting interest that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States magistrate or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court.

Title 18 U.S.C. Section 3006 (A) (f) provides as follows:

> (f) *Receipt of other payments.*—Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section.

Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

Title 26 U.S.C. Section 7201 provides as follows:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Title 28 U.S.C. Section 2255 provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, *or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack,* the court shall vacate and

set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detenttion.

Rule 44 of the Federal Rules of Criminal Procedure Title 18, U.S.C. provides as follows:

If the defendant appears in court without counsel the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.